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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 303

C. H. SELLERS, et al

Petitioners,

vs.

STANOLIND OIL AND GAS COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The facts of this case are detailed in the opinion of the court below (R. 483; 174 F. 2d 948).

Petitioners have not shown, and cannot show, that this case should be reviewed by this Court for any of the reasons enumerated in Rule 38, Sec. 5(b). No such reasons, or "character of reasons", exist.

The four points advanced by petitioners for the allowance of the writ are entirely without merit.

1. **The court below did not try this case de novo.** (Answering Pet. for Cert. p. 7 *et seq.*)

In support of their contention that the court below tried this case *de novo*, petitioners state at page 7:

> "Indeed, in its opinion it [the court below] refers to itself as 'we the trier of the facts.' "

This misquotation distorts the court's language and meaning. The court, very carefully differentiating its function from that of the trier of facts, used the following language:

> "Our first inquiry then is to search the record to see if there is substantial evidence supporting the court's finding that the acts and conduct of Stanolind did not meet the requirements of the rule. *If so*, the judgment in that respect must be affirmed *even though we as the trier of the facts might* have reached a different conclusion." (R. 487) [Italics ours.]

2. **The court below reversed because the finding of the trial judge was "clearly erroneous."** (Answering Pet. for Cert. p. 9.)

In a jury-waived case it is the duty of a circuit court of appeals to set aside findings which are clearly erroneous. In *United States* v. *U. S. Gypsum Co.*, 1948, 333 U. S. 364, this court said:

> ". . . That rule [Rule 52(a)] prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice [citing cases]. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies [citing cases] or by a jury, [citing cases] this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior

> to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however [citing cases]. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The court below extensively detailed the facts in this case (R. 487-492) and concluded that the findings were clearly erroneous:

> "An extended recitation of these facts in considerable detail is necessary to present a true picture of the situation. Considered in their setting and without taking into consideration the testimony of appellees, these facts seem to be overwhelming and to support but one conclusion, namely, that Stanolind acted in good faith and in the only way that a prudent operator would have acted under all the circumstances as outlined above."

The testimony of the expert Wheeler was the only evidence which could have sustained petitioners' burden of proof that an offset well drilled on the Sellers' land probably would have produced sufficient oil to repay the expense of drilling, equipping and operating such well plus a reasonable return on the outlay and that therefore respondent was in bad faith and not in the exercise of ordinary prudence in failing to drill such offset well. Before analyzing Wheeler's testimony, the court below said (R. 493):

> "There was a clear conflict in the evidence as given by Wheeler and that given by the expert witnesses for Stanolind. The court adopted the testimony of plaintiffs' sole expert witness and rejected that of the numerous experts offered by Stanolind. This does not

> constitute reversible error if the testimony of Wheeler is competent and is sufficient to sustain the burden resting upon plaintiffs in a case such as this to prove that an offset well probably would have paid out."

This statement refutes petitioners' repeated assertion that the court below tried the case *de novo* "under the guise" of examining the record to ascertain if there was substantial evidence to sustain the judgment (Pet. for Cert. pp. 2, 7). It also disposes of petitioners' contention that the court below reversed "by preferring the testimony of Respondent's four experts over Petitioners' one expert" thereby paying mere "lip service" to Rule 52(a) of the Rules of Civil Procedure.

Acting within the proper scope of review, the majority below concluded that Wheeler's testimony was incompetent, without probative value, and insufficient to sustain the findings of the trial court (R. 493-499) because

(a) his opinion was based on hearsay evidence, that is, on trade journal articles containing estimates of barrel per acre oil recovery over the entire field, which estimates were made by persons not present at the trial for cross-examination (R. 494);

(b) his opinion was based on a formula applicable only to a unitized operation of an entire field. This type of operation was not effected until a year after respondent's relinquishment of its leases. Furthermore the formula does not measure recoverable oil underlying a given tract of land under any type of operation (R. 496).

Judge Murrah concurred in the reversal "squarely upon the premise that when Dr. Wheeler's testimony concerning whether Stanolind should have drilled the offset wells is considered in the light of the physical facts, and judged by

the Oklahoma prudent operator's rule, well stated in the opinion, it is insufficient to support a finding of bad faith as a basis for a legal conclusion of imprudent development." (R. 499)*

Petitioners on page 6 make the ridiculous assertion that it was to respondent's interest not to drill an offset well on the Sellers' tract but "to let petitioners' oil be drained away" because respondent "owned over 10 per cent of the field" and "stood to gain $137,334.55 with no investment and expense." This assertion is based on a finding of the trial court, rejected by the court below, that Sellers' land was underlaid with recoverable oil of the value of $1,310,484.63 (R. 173) of which respondent would receive over 10 per cent, or $137,334.55, because of unitization of the whole field and its ownership of adjacent wells. But if the assumption were correct (i. e., if the Sellers' tract were underlaid with recoverable oil of the value of $1,310,484.63) it obviously would have been to respondent's interest to drill (at the agreed cost of $225,000, R. 219) on the Sellers' tract, and thereby to obtain its full leasehold interest of slightly more than 82% (R. 19) in the $1,310,484.63, which, after deducting the $225,000 well cost, would have netted respondent $882,961.40, instead of the $137,334.55.

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* Petitioners seem to contend (Pet. for Cert. pp. 7, 9) that a reviewing court in a jury-waived case may not consider the question of the sufficiency of the evidence in the absence of a motion raising that question in the trial court. The authorities cited by petitioners on the point were superseded by the Rules of Civil Procedure, Rule 52(b): "When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court objection to such findings or has made a motion to amend them or a motion for judgment." See *Monaghan* v. *Hill,* (1944, C. A. 9), 140 F. 2d 31; and 3 Moore's Federal Practice, Secs. 52.01-52.03, pp. 3115-3120.

3. **The court below in this jury-waived case properly reversed and remanded with directions to enter judgment for respondent.** (Answering Pet. for Cert. p. 10.)

28 U. S. C. A. § 2106 permits a circuit court of appeals on reversing any judgment to "remand the cause and direct the entry of such appropriate judgment, decree or order • • • as may be just under the circumstances."

In jury-waived cases the procedure is that of cases in equity (*United States* v. *U. S. Gypsum Co., supra*). In equity cases a reviewing court always had the power and duty to reverse and remand with directions to enter judgment when no useful purpose would be served by ordering a new trial. Since the adoption of the Rules of Civil Procedure, federal Courts of Appeal in jury-waived cases have not hesitated to exercise this power when the facts have been fully exposed and a new trial would be useless. *U. S.* v. *Armature Rewinding Co.*, 1942, C. A. 8, 124 F. 2d 589; *Aetna Life Ins. Co.* v. *Kepler*, 1940, C. A. 8, 116 F. 2d 1; *U. S.* v. *Iovacchini*, 1940, C. A. 3, 116 F. 2d 345; *State Farm Mut. Automobile Ins. Co.* v. *Bonacci*, 1940, C. A. 8, 111 F. 2d 412. Cf. *Campana Corporation* v. *Harrison*, 1940, C. A. 7, 114 F. 2d 400; *Chatz* v. *Armour Plant Employee's Credit Union*, 1946, C. A. 7, 154 F. 2d 236; *Fleming* v. *Palmer*, 1941, C. A. 1, 123 F. 2d 749; *Sanders* v. *Leech*, 1946, C. A. 5, 158 F. 2d 486.

The court below, after considering the physical and undisputed facts of this case, concluded that respondent had acted in good faith and in the only way that a prudent operator would have acted under all the circumstances (R. 492-493). The court therefore properly remanded the case with directions to enter judgment for respondent inasmuch as a new trial could not have resulted in any other conclusion.

4. **This suit involved a separable controversy as to the second and third causes of action and hence was properly removed.** (Answering Pet. for Cert. p. 11.)

Petitioners state that there was no separable controversy as to the first cause of action (later abandoned by petitioner Sellers, R. 168, 484). Hence it is argued that the removal was improper.

The petition for removal (R. 24) was based, and was granted, on the specific ground that the second and third causes of action were separable from the first cause of action, and that they disclosed a controversy "wholly between citizens of different States" which could be "fully determined as between them"; wherefore, pursuant to 28 U. S. C. A. § 71 (the removal statute then in effect) the entire suit was removable to the District Court (*Pullman Co.* v. *Jenkins*, 1939, 305 U. S. 534).

Plaintiff did not at the time contest and cannot now successfully contest the removability of this suit because the separability of the second and third causes of action is irrefutably proved by the record as follows: *First:* The suit was dismissed against the co-defendant Signal Royalties Company on demurrer (R. 29, 418), which co-defendant was finally aligned by the District Court with plaintiffs and judgment entered in its favor (R. 175). *Second:* The co-defendants Jenkins (R. 138) and Wescott (R. 28) answered and assumed the position of plaintiffs. *Third:* The judgment of the District Court was for plaintiffs—including Signal Royalties, Jenkins and Westcott—against respondent alone (R. 175).

Petitioners ask this Court to take a case, fully heard and adjudicated in the court below, for the purpose of exam-

ining again the facts of a particular situation between individual litigants and of no interest other than to the parties directly involved. That, we believe, is neither the function of the writ, nor of the Court. If this Court should undertake to grant writs to review this type of case, it will thereby become burdened with examining the evidence and rendering decisions in countless cases, each turning upon its own facts, without furnishing any light to litigants concerned in future and similar controversies. As stated by Chief Justice Taft in *Magnum Import Company* v. *Coty*, 1923, 262 U. S. 159:

> "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

It is submitted that the petition should be denied.

Respectfully submitted,

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